SUPREME COURT, U. S.
SEP 21 1973
MICHAEL RODAK, JR., CLERK

No. 73-150

# In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANK LEO VUCI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner contends that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment.

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on three counts of having used interstate facilities to further illegal gambling and one count of conspiracy, in violation of 18 U.S.C. 1952 and 371. He was sentenced to four concurrent terms of five years' imprisonment and fined $10,000 on one of the counts. The court of appeals affirmed *per curiam* (450 F. 2d 940). A petition for a writ of certiorari was denied (405 U.S. 1064).

On June 16, 1972, petitioner filed in the trial court a motion for reduction of sentence, which was denied. On August 24, 1972, he filed another motion for re-

duction of sentence in the form of a request for sentencing under 18 U.S.C. 4208(a), which request was denied. The instant motion "To Vacate Judgment and to Dismiss Indictment or Correct Illegal Sentence" was filed in the trial court on November 17, 1972, and, after reviewing the entire record for the fourth time, the United States District Court for the Eastern District of Louisiana denied the motion (Pet. App. C). The court of appeals affirmed *per curiam* (Pet. App. A).

The facts underlying the original conviction are set out in detail in our brief in opposition to the earlier petition for a writ of certiorari to review the conviction, which was denied at 405 U.S. 1064. Briefly, those facts show that petitioner and others had been operating a gambling establishment for several years near Port Allen, Louisiana. The gambling consisted of bookmaking, card games, slot machines, and a large bingo operation, ostensibly sponsored by civic groups but in fact inuring to the personal benefit of petitioner and his partners. In the course of operations, they had to replenish the bingo equipment. In January 1967, petitioner mailed an order to a firm in Colorado for an electric bingo blower, which was delivered by common carrier in February 1967. In June 1967, petitioner ordered from the same firm four thousand bingo cards, a flashboard, and another blower, which were delivered by common carrier the same month. In January 1969, a co-defendant ordered from the same firm 1500 more bingo cards, which were shipped by air freight and brought to the club. F.B.I. agents executed a search warrant in January 1969 and seized eighteen telephones, betting slips, a sports blackboard ("tote board"), bingo equipment, and other gambling paraphernalia. Slot machines were removed by a local sheriff.

Petitioner contends that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. He maintains that the penalty imposed by Congress for use of a facility in interstate commerce to carry on a gambling operation cannot be greater than that which would be imposed by state law for the operation of a gambling establishment. This argument is without merit. The concern of Congress in enacting 18 U.S.C. 1952 was the widespread use of interstate facilities in connection with gambling and other illicit activities. See *United States* v. *Nardello,* 393 U.S. 282, 292. The legislative response was related to the gravity of the problem which Congress, not the states, perceived. A penalty of up to five years' imprisonment and a $10,000 fine is not unusual for crimes of this nature,[1] and it is not grossly disproportionate to the crime. *United States* v. *Gerhart,* 275 F. Supp. 443 (D. W. Va.).

Except where a sentence is illegal, such as where it exceeds the statutory maximum, a sentencing judge's exercise of discretion is not reviewable. *Gore* v. *United States,* 357 U.S. 386, 393; *Blockburger* v. *United States,* 284 U.S. 299, 305; *Gallagher* v. *United States,* 406 F. 2d 102, 109 (C.A. 8), certiorari denied, 395 U.S. 968. Here, the statutory maximum on each of the four counts was five years' imprisonment and a $10,000 fine, or a total in this case of twenty years' imprisonment and a $40,000 fine. Petitioner's sentence of five years' im-

[1] See 18 U.S.C. 1511, 1953, 1955, and 1961-1963.

prisonment and a $10,000 fine was well within the statutory limits.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1973.

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[2] As noted by the district court (Pet. App. C-50):

> [T]his was not * * * a "petty offense of gambling." The evidence in the case would have justified the full extent of the punishment provided by law being imposed.